United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1377

To be argued by
THOMAS M. FORTUIN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1377

UNITED STATES OF AMERICA,
Appellee,

—v.—

ANGELO SEIJO,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

OTHER AUTHORITIES

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1377

UNITED STATES OF AMERICA,

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—v.—

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Preliminary Statement

Angelo Seijo appeals from a judgment of conviction entered on October 24, 1975 in the United States District Court for the Southern District of New York after a four-day trial before the Honorable Charles L. Brieant, Jr., United States District Judge, and a jury.

Indictment 74 Cr. 606, filed on June 14, 1974, charged the appellant Angelo Seijo, Nicholas Hildebrandt, Leonard Torres and James DiDomenico in Count One with conspiracy to violate the Federal narcotics laws during the period from April 1, 1974 to June 14, 1974, in violation of Title 21, United States Code, Section 846. Count Two charged Hildebrandt, Torres and DiDomenico with distributing approximately 38 grams of heroin on April 11, 1974. Count Three charged Torres and Hildebrandt with distributing approximately 162 grams of heroin on April

18, 1974. Count Four charged all four defendants with distributing approximatley 260 grams of heroin on June 5, 1974. Count Five charged Seijo with possessing with intent to distribute approximately 34 grams of heroin on June 5, 1974.* Counts Two through Five charged violations of Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A) and Title 18, United States Code, Section 2. Count Six charged Seijo with unlawfully carrying a firearm during the commission of the felonies charged in Counts One, Four and Five, in violation of Title 18, United States Code, Section 924(c)(2).

The indictment was initially assigned to Judge MacMahon. Prior to trial, Judge MacMahon severed Count Six. The trial began on July 29, 1974. That morning, Torres pleaded guilty to Count One of the indictment and later testified as a Government witness.

The trial lasted two days, and on July 30, 1974, the jury found Seijo guilty on Counts One and Four and not guilty on Count Five and Hildebrandt and DiDomenico guilty on all counts in which they were named.

All defendants were sentenced on October 1, 1974 by Judge MacMahon. Judge MacMahon sentenced Seijo to concurrent terms of 15 years' imprisonment on each of the two counts on which he was convicted, to be followed

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* The weight of heroin charged in the indictment incorrectly represented in each case the gross weight of the heroin distributed or possessed, *i.e.*, the weight of the heroin as well as the weight of the container in which the heroin was found. The amounts of heroin actually involved, which were stipulated to at both trials below, were as follows:

Count 2	13.8 grams
Count 3	122.0 grams
Count 4	217.4 grams
Count 5	7.6 grams

Seijo repeatedly and misleadingly refers to the heroin involved in Count Five as if it weighed 34 grams, not 7.6 grams.

by a three-year special parole term. At the time of sentence, the Court, with the Government's consent, dismissed Count Six against Seijo.

Seijo and Hildebrandt appealed their convictions. On April 23, 1975, this Court reversed Seijo's and Hildebrandt's convictions and remanded the case for retrial. *United States* v. *Seijo*, 514 F.2d 1357 (2d Cir. 1975). The convictions were reversed on the sole ground that the defendant Torres, who had testified as a Government witness, had, unbeknownst to the Government, falsely denied any prior criminal convictions when in fact he had previously been convicted of possession of marijuana in the state of North Carolina.

On remand, the case was assigned to Judge Brieant. Trial began on September 16, 1975. On the morning on which the second trial began, Hildebrandt pleaded guilty to Counts Three and Four of the indictment, and Seijo proceeded to trial alone. After a four-day trial, the jury convicted Seijo on both Counts One and Four.

On October 24, 1975 Judge Brieant sentenced Seijo to concurrent 15-year terms of imprisonment on Counts One and Four, to be followed by a special parole term of three years. Seijo is at liberty pending this appeal.

Statement of Facts

The Government's Case

The Government's proof at trial established that Angelo Seijo was responsible for financing a heroin operation run by Nicholas Hildebrandt, and that on June 5, 1974, he accompanied Hildebrandt and Torres to a Howard Johnson's restaurant located across from the Bronx Zoo in order to protect them and assist them in

the delivery of approximately one-quarter kilogram of heroin to Joseph Scamardella, a New York City Detective assigned to the New York Drug Enforcement Task Force and posing as a dealer in narcotics. The evidence further revealed that Seijo used threats of violence in order to further the conspiratorial acts proved a trial.

On April 10, 1974, Detective Scamardella was introduced by Tom Frano, a Government informant, to Leonard Torres and James DiDomenico inside Scamardella's car in the vicinity of Layton Avenue between East Tremont and Edwards Avenues in the Bronx (Tr. 39-42).* Scamardella told Torres and DiDomenico that he wanted to purchase a half-ounce of heroin in order to determine the quality of the heroin that DiDomenico and Torres were selling (Tr. 42-43, 90). DiDomenico and Torres informed Scamardella that the half-ounce of heroin would cost $600 and that it would be capable of being cut three times before being resold. Scamardella agreed to meet with Torres, DiDomenico and Frano the following day (Tr. 43).

That evening, DiDomenico and Torres proceeded to Neckles Beach Bar in the Bronx and met with Nicholas Hildebrandt (Tr. 90). Hildebrandt agreed to supply the heroin and instructed Torres to come to his shop the following day (Tr. 91). The next day, April 11, 1974, Torres went to Hildebrandt's sewing shop on the second floor of a building on Morris Park Avenue in the Bronx. Inside his office, Hildebrandt gave Torres the half-ounce of heroin (Tr. 92). Outside the shop, Torres met Di-

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* References to "Tr." are to pages of the trial transcript. References to "F. Tr." are to pages of the trial transcript of the first trial before Judge MacMahon. References to "GX" are to Government exhibits in this trial and "DX" to defendant's exhibits. References to "Br." are to pages of the Appellant's Brief.

Domenico and Frano, who took the heroin from him (Tr. 92). Later in the day, the three men, DiDomenico, Torres and Frano, met with Detective Scamardella. DiDomenico handed Scamardella the half-ounce of heroin and received the $600 in exchange (Tr. 93, 44-45, GX 1). DiDomenico and Torres assured Scamardella that they would have no problem in obtaining one-eighth of a kilogram of heroin, if he so desired (Tr. 45).

On April 17, 1974, Scamardella called Torres and asked to purchase the eighth of a kilogram of heroin from him (Tr. 46). Torres went to Hildebrandt's house, where Hildebrandt agreed to supply the eighth kilogram (Tr. 94). On April 18, 1974, Torres obtained the eighth kilogram from Hildebrandt and delivered it to Scamardella (Tr. 95-97, 51-54, GX 2). Scamardella paid Torres $4,900, which Torrest immediately delivered to Hildebrandt at Neckles Beach Bar (Tr. 97-98, 52-53, 306-08).

Shortly thereafter, Hildebrandt gave three ounces of heroin to Torres: one ounce in payment for Torres' role in the previous two deals; and two additional ounces on consignment (Tr. 98-99). Torres turned the three ounces over to Frano, who had told him that he would sell them (Tr. 98-99). Frano, however, disappeared with the narcotics, and Hildebrandt demanded payment from Torres (Tr. 99). Sometime in May, 1974, Hildebrandt, still demanding payment for the narcotics, summoned Torres to Neckles Beach Bar where he introduced Torres to Angelo Seijo (Tr. 100). Hildebrandt told Torres, "Listen, you won't be dealing with me no more, you are going to have to be dealing with Angelo Seijo" (Tr. 101). Seijo then grabbed Torres and told him, "Listen, I am the man behind the whole thing." Seijo continued, "I was backing up Nick. Now he owes me the money and now I want it from you" (Tr. 101). Seijo then warned Torres that, if he did not pay up, Seijo would

kill Torres, Torres' wife and Torres' entire family and "dump them in the bay" (Tr. 102). Torres proceeded to give Hildebrandt and Seijo a 1965 Chevrolet in partial payment for the narcotic debt (Tr. 102).

Shortly thereafter, Scamardella called Torres asking to purchase one and a half kilograms of heroin (Tr. 102). Torres went to Neckles Beach Bar and again met with Seijo and Hildebrandt (Tr. 102-03). Hildebrandt agreed to supply a half-pound of heroin each day for five successive days (Tr. 103). Torres communicated this proposal to Scamardella, who refused it (Tr. 103).

In early June, 1974, Scamardella called Torres and asked him if he could deliver two-eighth kilograms of heroin (Tr. 105). Torres again met with Seijo and Hildebrandt at Neckles Beach Bar, and they agreed to supply the heroin for approximately $9,000 (Tr. 106). Torres then arranged to meet Scamardella on June 5, 1974 at a Howard Johnson's Restaurant located across from the Bronx Zoo (Tr. 106-07).

Torres met Scamardella at the Howard Johnson's at approximately eight o'clock in the evening (Tr. 68). Earlier in the day, both Hildebrandt and Seijo had assured Torres at Neckles Beach Bar that they would have the heroin ready and warned him not to "mess up" (Tr. 107). From the Howard Johnson's Torres called Hildebrandt at his sewing shop. Hildebrandt told Torres to meet him at the Neckles Beach Bar and to bring Scarmadella with him. Scarmadella, aware that a surveillance team was positioned at the restaurant, refused to go to the Beach Bar, and Hildebrandt instructed Torres to meet him at the bar (Tr. 108). Torres proceeded to the bar and, not finding Hildebrandt or Seijo there, went to Hildebrandt's sewing shop (Tr. 108-09). In front of the shop he met Hildebrandt and Seijo. Hildebrandt handed Torres the package of heroin,

and Torres saw Seijo put a smaller package of heroin into his pants. Torres described this package as approximately a half ounce of heroin (Tr. 109). Hildebrandt and Seijo told Torres they would follow him to Howard Johnson's in the Chevrolet which Torres had turned over to them (Tr. 110). Seijo also instructed Torres that, when he arrived at the Howard Johnson's, he was to get out of the Toyota he was driving and that Seijo would get into the Toyota and follow Torres into the Howard Johnson's parking lot (Tr. 110).

Torres, followed by Hildebrandt and Seijo, drove to a street about a block from the Howard Johnson's (Tr. 110-11), where the two cars pulled to the curb. Torres got out of his Toyota and walked back to the Chevrolet, in which Seijo and Hildebrandt were seated (Tr. 111-12, 181). Seijo told Torres that he would follow him into the Howard Johnson's parking lot. Torres returned to the Toyota, removed the package containing the two-eighth kilograms of heroin from the car, and started walking to the Howard Johnson's parking lot. Seijo got out of the Chevrolet, entered Torres' Toyota, and followed closely behind Torres at about the speed at which Torres was walking. Torres entered the Howard Johnson's parking lot closely followed by Seijo in the Toyota and met with Scamardella in Scamardella's car (Tr. 182-83, 205-06, 310). Torres handed Scamardella the package of heroin, and Scamardella then got out of the car and opened the trunk (Tr. 72, GX 3). At this point, surveillance officers arrested Torres (Tr. 111-12).

As Sergeant Flynn approached the Toyota in order to arrest Seijo, Flynn shouted, "You are under arrest. Don't move. Don't do anything foolish." Seijo responded, "What for? I am waiting for my girlfriend" (Tr. 207).

Sergeant Flynn then asked Seijo to get out of the car and, when he did so, patted down his outer garments in search of a weapon. Flynn did not ask Seijo to empty his pockets (Tr. 207). Seijo was then handcuffed and put into the back seat of Flynn's car, on the driver's side. Torres was also placed in the back seat of Flynn's car either after, or simultaneously with, Seijo (Tr. 208).

After Seijo and Torres were seated in the back seat of Flynn's car, Police Officer Newton approached Flynn's car, and both Newton and Flynn saw Seijo moving his handcuffed hands behind his back (Tr. 196, 208). Newton demonstrated Seijo's movements at trial, showing that Seijo had pushed his hands up and down and moved them from side to side (Tr. 197). After Newton and Flynn saw Seijo move his hands in this fashion, they promptly removed Seijo and Torres from the car. The rear seat was then moved, and Newton found a small pocket containing 7.6 grams (approximately one quarter ounce) of heroin under the seat directly behind where Seijo had been seated. Earlier that evening, Flynn, in conformity with Police Department practice (Tr. 310), had searched behind the back seat and found nothing (Tr. 209). Only Seijo and Torres had been in the back seat between the time of Flynn's initial search and Newton's discovery of the package (Tr. 209).

The heroin found behind Seijo's seat (GX 4) matched in composition that which Torres had previously delivered on April 11th (GX 1) and the two eighth kilograms of heroin delivered that very night (GX 3). All three samples varied only slightly in concentration of heroin,* and all four had been diluted with only

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* GX 1		15%
GX 3	first package	16%
	second package	19.8%
GX 4		16.9% (Tr. 221).

lactose, which was relatively rare, occurring in only 7% of the illicit heroin samples examined by the chemist (Tr. 221-22).*

The Defense Case

Seijo testified in his own behalf. At the time of the offense, Seijo was 33 years old; had been laid off from his job as a laborer for two weeks; and had recently been separated from his wife (Tr. 228). Seijo had no prior arrests or convictions. He knew Hildebrandt through the latter's marriage to Mrs. Seijo's cousin (Tr. 235). He denied, however, any knowledge that Hildebrandt was engaged in narcotics traffic.

Seijo testified in his own behalf. At the time of the he worked on a row boat he had purchased from Hildebrandt at a boat yard in the vicinity of Neckles Beach Bar (Tr. 229-34). After a short time, Hildebrandt joined Seijo, and later the two, accompanied by a charter boat captain, entered Neckles Beach Bar to drink beer and watch television (Tr. 236-37). About eight o'clock in the evening Torres arrived and conversed with Hildebrandt out of Seijo's hearing. After Torres' departure, Hildebrandt informed Seijo that Torres had offered to pay each of them $25 if they would accompany Torres for protection while he attempted to collect some money that was owed him (Tr. 237-40). With Seijo driving, Hildebrandt and Seijo gave the charter boat captain a ride toward his home (Tr. 241-42).

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* Torres, who testified on behalf of the Government, admitted that while in the Army at Fort Bragg in North Carolina he had been convicted for possession of marijuana (Tr. 113). He testified that he had denied this conviction at the prior trial because his probation officer had told him that if he ever got arrested or if he ever wanted a job, he would not have to disclose his previous conviction (Tr. 113-14).

After discharging their passenger at Pelham Parkway, Seijo and Hildebrandt proceeded to a bar in the vicinity of Hildebrandt's sewing shop (Tr. 240-43). After Hildebrandt entered the bar and talked to Torres, Seijo and Hildebrandt followed Torres to the vicinity of a Howard Johnson's Restaurant, where they parked the Chevrolet behind Torres' Toyota (Tr. 243-44).

According to Seijo, Torres, who at the time had two eighth kilograms of heroin on the front seat of his car, drove in a manner which would arouse the suspicions of the authorities, exceeding the speed limit and making illegal U-turns (Tr. 244, 266-67).

Upon arriving at the Howard Johnson's, Torres asked Seijo to drive the Toyota into the Howard Johnson's parking lot while Torres went on foot to meet the person who was to bring him the money. Hildebrandt remained in the parked vehicle, apparently asleep from having had too much to drink. Seijo observed Torres remove a package from the Toyota and then walk toward the parking lot. Seijo entered the Toyota and made a U-turn (Tr. 245-46). According to Seijo's testimony, and contrary to the testimony of four officers and agents conducting surveillance of the Howard Johnson's parking lot (Tr. 183, 193, 205-06, 309-10), he reached the parking lot ahead of Torres while Torres was still in front of a gas station near the Howard Johnson's (Tr. 246, 279) and parked the vehicle. From this vantage point Seijo observed Torres enter a white car, where the delivery of the package to Detective Scamardella was accomplished (Tr. 248).

According to Seijo he was then arrested and, contrary to the testimony of Sergeant Flynn (Tr. 207), was told to empty his pockets and was frisked twice (Tr. 249-50). Seijo also denied telling Flynn at the time of his arrest that he was waiting for his girlfriend (Tr. 249). Again,

contrary to Flynn's testimony, Seijo stated that Torres was already seated in Flynn's car when he was placed in the car (Tr. 250).

Seijo denied he had ever threatened Torres (Tr. 239); disclaimed financing any of Hildebrandt's alleged narcotic operations (Tr. 252); and denied ever having possessed Government Exhibit Four, the 7.6 grams of heroin (Tr. 251).

On cross-examination, Seijo was confronted by a signed statement he had given when interviewed after his arrest by an Assistant United States Attorney (Tr. 259). He testified that three portions of the statement, which were inconsistent with his trial testimony, were false:

—First, at trial, Seijo testified that Torres asked Hildebrandt to accompany him to Howard Johnson's outside of Seijo's presence. Seijo's signed statement states, however, "Lenny said that some guy owed him money and told us" —admittedly Seijo and Hildebrandt—"to take a ride and to see this guy about the money" (Tr. 263). Seijo testified that that statement was false (Tr. 284).

—Second, Seijo testified that his signed statement that after he was put in the back seat of Flynn's car "I was moving around to make the cuffs stop hurting" was not true (Tr. 275-76).*

—Third, Seijo testified that his signed statement that DiDomenico "hangs out" at Neckles Beach Bar was not true (Tr. 258-60, 284).

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* This inconsistency was important because moving around would actually increase, not decrease, the discomfort of the handcuffs (Tr. 209-10). The moving around, therefore, tended to establish that Seijo was attempting to dispose of the narcotics later found under the car seat (GX 4) and was not merely reacting to the pressure of the handcuffs as he claimed after his arrest.

Seijo testified that he had read the statement before signing it (Tr. 283) and recognized that portions were false and inaccurate (Tr. 284). But he claimed that, even though he knew the statement could be used against him in a court of law and was "a pretty important statement," he did not think it was important to call to the attention of the United States Attorney mistakes in the statement he was signing, "because it was the first time I had ever been arrested" (Tr. 284).

Seijo also testified that Police Officer's Newton's testimony about how Seijo moved his hands behind his back while seated in Flynn's car was false (Tr. 274-75).

Seijo also called as a witness Ascanio Radano, a Police Officer who had retired eight years earlier after having served 20 years on the force (Tr. 287, 291). Radano testified that he was familiar with the police procedure known as a pat-down or a frisk (Tr. 291), and that after an arrest, he routinely asked the arrested person to empty his pockets (Tr. 299). When asked if an object the size and hardness of Government's Exhibit Four would have been discovered during the normal pat-down procedure if it had been inside Seijo's pockets at the time of his arrest, Radano testified, "I would think so, yes." (Tr. 301). On cross-examination Radano admitted that he had absolutely no information as to current police practices (Tr. 303); that he had made only one arrest in the past eight years (Tr. 303); that he had never participated in a narcotics case (Tr. 292); that he had never participated in a mass arrest where more than two people were being arrested at one time (Tr. 292); that he had never previously qualified as an expert on police procedure (Tr. 292-93); and that, in fact, for 20 years on the Police Force he had never risen above the rank of police officer and had been assigned exclusively to the warrant squad, where his duties involved arresting fugitives who were not, at the time of their arrest, actively engaged in any criminal conduct (Tr. 293-94).

Radano's testimony about police procedures was contradicted by Detective Drucker of the New York Drug Enforcement Task Force, a narcotics detective, who had made over 1000 arrests involving narcotics (Tr. 308-09, 311-14).

ARGUMENT

POINT I

Seijo's acquittal on Count Five at his first trial did not estop the Government from offering proof concerning his possession of the 7.6 gram package of heroin found under the backseat of the police officers' car.

Seijo asserts that his acquittal at his first trial on Count Five of the Indictment, which charged *possession with intent to distribute* the package containing 7.6 grams of heroin found beneath the backseat of the police officers' car shortly after Seijo's arrest, collaterally estopped the Government from offering proof at his second trial that he had *possessed* the package (GX 4) while in the backseat.* Seijo's argument ignores the facts underlying the two trials, misconceives the law concerning the applicability of collateral estoppel and is patently devoid of merit.

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* The evidence of Seijo's possession of Government Exhibit Four was offered at the retrial (Tr. 7-8) and received (Tr. 21) solely to show Seijo's connection to the conspiracy and access to the heroin distributed by the conspiracy; the heroin in the exhibit was similar to other heroin distributed by the conspirators. Judge Brieant carefully instructed the jury that its consideration of the evidence should be limited to that issue (Tr. 394-95).

A. The evidence adduced at the first trial and the charge to the jury.

At the first trial of Seijo, the evidence adduced was substantially the same as that offered at the second trial,* with one important exception. There was evidence at the first trial that, when DiDomenico was arrested on June 6, 1974, he had in his possession a small tinfoil packet (F. Tr. 190-91; GX 5). This packet weighed 27 grams in all and contained 2.1 grams of a white powder containing heroin. This heroin, like that found under Seijo's seat, matched in composition the other heroin that had been delivered. It had been cut only with lactose, and it contained heroin in a percentage of 15.5% (F. Tr. 196-97). Neither DiDomenico nor any other defendant was charged in the indictment with possession of, or possession with intent to distribute, this small amount of heroin. Evidence of DiDomenico's possession of the small packet on June 6, 1974, was offered solely to tie him to the other defendants and the distribution

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* At the first trial, Seijo was charged in Count Five with possession with intent to distribute a packet containing 7.6 grams of heroin which was found directly underneath the seat on which Seijo was seated following his arrest. The proof adduced in support of this charge was that after Seijo was arrested and placed in the back seat of the Government car with Torres, the arresting officers saw Seijo moving his handcuffed hands up and down behind his back. The officers then removed Seijo and Torres from the car and found, directly under the side of the seat on which Seijo had been seated, the packet of heroin (F. Tr. 119-21). In addition, Torres testified that he had seen Seijo place a similar package in his pants as they were leaving Hildebrandt's shop earlier that evening (F. Tr. 106-07).

Seijo took the stand and testified that he never possessed the packet (F. Tr. 296, 298-99). Based on this testimony, and the testimony of Ascanio Radano that, if such a packet had been hidden in Seijo's pants, it would have been detected during the frisk conducted before Seijo was put in the Government car (F. Tr. 274), defense counsel argued to the jury that the package must have been brought into the car by Torres, not Seijo (F. Tr. 344).

of the quarter kilogram of heroin offered for sale to the police officers on June 5, 1974.

Counsel for DiDomenico sought, by cross-examining the police officer who seized the small packet from DiDomenico, to establish that possession of the 2.1 grams of heroin was not conclusive of the fact that DiDomenico intended to distribute the packet. Through his questioning, he established that the value of the 2.1 gram packet was only 20 to 25 dollars:

> "Q. Detective, at the time you found [the packet], did you ask him whether he was a user? A. Yes.
>
> Q. How did he answer? A. I believe he said he was an addict, but he was currently in the program.
>
> Q. He was on a program? A. Yes.
>
> Q. And would this dose be that of a user's dose? A. I wouldn't be able to examine what amount a user would use. It varies with different people.
>
> Q. In any event, it is not a substantial amount, is that correct? A. It is a substantial amount in there.
>
> Q. It is a substantial amount? A. In that packet.
>
> Q. In that package? A. Yes.
>
> Q. What would you say the worth of this is? A. The worth?
>
> Q. Of this amount? A. Approximately 20, 25 dollars.
>
> Q. 20, 25 dollars? A. Yes" (F. Tr. 192-93).*

After this evidence had been adduced, Judge MacMahon, in charging the jury on the elements of the sub-

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* Seijo's counsel ignores this testimony by stating, "Moreover, no evidence was produced by either side which would have permitted the jury to conclude that the amount of drugs involved was such that it might have been possessed for one's own use rather than for distribution" (Br. at 24).

stantive counts of the indictment, instructed the jury that to convict they must not only find that the defendants possessed heroin but that they must also find that the defendants possessed it with an intent to distribute it:

> "The first element is satisfied if you find that the defendant either intentionally distributed heroin or knowingly possessed heroin with an intent to distribute it, either one.
>
> * * * * *
>
> So the term 'possess with intent to distribute' means to control a narcotic drug with a state of mind or purpose to transfer it" (F. Tr. 394).

Thus, there was evidence by which the jury, using simple mathematics, could find that the amount of heroin seized under Seijo's seat, 7.6 grams (approximately a quarter ounce), was worth only $70 to $90.

B. Seijo has not met his burden of establishing "with certainty" that the verdict in his first trial "necessarily" determined that he did not possess the heroin found under the seat of the Government car.

Assuming that the doctrine of collateral estoppel has applicability to a retrial of a multiple count indictment, a proposition which the Government vehemently opposes (see discussion at pp. 21-25, *infra*), Seijo has not met his burden of showing *with certainty* that the verdict at the prior trial *necessarily* determined that Seijo did not possess the heroin found under the back seat, since the jury could have concluded that the Government had failed to prove beyond a reasonable doubt that he intended to distribute the heroin.

Incorporated in the constitutional protection against double jeopardy is the doctrine of collateral estoppel, which

provides that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future law suit." *Ashe* v. *Swenson*, 397 U.S. 436, 443 (1970). *Accord*, *Harris* v. *Washington*, 404 U.S. 55, 56 (1971). But there is nothing about this doctrine that purports to require the Government to truncate its evidence in a subsequent proceeding where it cannot be determined "with certainty," *United States* v. *Cioffi*, 487 F.2d 492, 498 (2d Cir. 1973), *cert. denied*, 414 U.S. 1151 (1974), how the jury at an earlier trial determined a particular issue. To the contrary, the burden falls upon the defendant, *United States* v. *Cala*, 521 F.2d 605, 608 (2d Cir. 1975); *United States* v. *Gugliaro*, 501 F.2d 68, 70 (2d Cir. 1974); *United States* v. *Tramunti*, 500 F.2d 1334, 1346 (2d Cir.), *cert. denied*, 419 U.S. 1079 (1974); *United States* v. *Friedland*, 391 F.2d 378, 382 (2d Cir. 1968), *cert. denied*, 404 U.S. 867 (1971), to convince the trial judge that the verdict in his prior prosecution *necessarily* determined the matters sought to be precluded at his later trial. *Sealfon* v. *United States*, 332 U.S. 575, 580 (1948); *United States* v. *Gugliaro*, *supra*, 501 F.2d at 70; *United States* v. *Tramunti*, *supra*, 500 F.2d at 1346; *United States* v. *Zane*, 495 F.2d 683, 691 (2d Cir.), *cert. denied*, 419 U.S. 895 (1974); *United States* v. *Friedland*, *supra*, 391 F.2d at 382; *Adams* v. *United States*, 287 F.2d 701, 704 (5th Cir. 1961).

In the usual case such as this one, where the prior determination has been based on a general verdict, this burden is especially difficult for the defense to overcome, since "it is not often possible to determine with precision how the judge or jury has decided any particular issue." *United States* v. *Cioffi*, *supra*, 487 F.2d at 498 n. 8 (quoting with approval Justice Schaefer of the Illinois Supreme Court). Thus, "it is a rare situation in which the collateral estoppel defense will be available to the defendant."

United States v. *Tramunti*, *supra*, 500 F.2d at 1346; see *United States* v. *Kramer*, 289 F.2d 909, 913 (2d Cir. 1961); *Adams* v. *United States*, *supra*, 287 F.2d at 703.

The test for application of the doctrine has recently been set forth by this Court as follows:

> "In determining what issues were necessarily resolved by the prior proceedings, the court is to take a practical approach, examining the record, pleadings, evidence and jury instructions in order to decide 'whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.' *Ashe* v. *Swenson*, *supra*, 397 U.S. at 444, 90 S.Ct. at 1194; *Sealfon* v. *United States*, 332 U.S. 575, 579, 68 S.Ct. 237, 92 L.Ed. 180 (1948); *United States* v. *Tramunti*, *supra*, 500 F.2d at 1346. If the jury could have done so in the prior case, the claim of colateral estoppel must fail, since the defendant can prevail only if the issue which he seeks to preclude from consideration was 'necessarily' resolved in his favor in the prior proceedings." *United States* v. *Cala*, *supra*, 521 F.2d at 608.

Consequently, in order to prevail here, Seijo must establish that by applying this analysis it is possible to determine "with certainty", *United States* v. *Cioffi*, *supra*, 487 F.2d at 498, that the jury in the first trial necessarily decided that he did not possess the package found under the back seat. However, an examination of the record of the prior trial, including the evidence adduced and the court's charge, clearly reveals that the acquittal on Count Five could have been based on determinations unrelated to the matters sought to be excluded in the instant case. Stated another way, the first jury could have believed Seijo had possessed the

packet of heroin in the back seat of the car, yet still acquitted him of possessing it with intent to distribute.

This is so because, as Judge Brieant found (Tr. 7-9, 13-17, 21), a rational jury, having heard undisputed testimony from which it could determine that 7.6 grams (approximately one-quarter ounce) of diluted heroin was worth no more than $70 to $90, might well have entertained a reasonable doubt about whether or not Seijo intended to keep this heroin for his own use. The jurors had, after all, seen and heard that the 7.6 gram package was dwarfed in terms of size and value by the other narcotics packages seized in this case. Also, the jurors, with nothing more than their common experience in the communities from which they were drawn or their reading concerning the cost of addicts' habits, could likely have concluded that the 7.6 grams of diluted heroin might be a user's amount. In addition, the fact that, when DiDomenico was arrested he had 2.1 grams of heroin in his possession, but he was not charged with possessing this amount with intent to distribute it, likely had an impact on the jury's decision whether this was a package which Seijo might have kept for himself.

To all this, Seijo unconvincingly replies that he testified at trial, and the Government did not contest, that he had never used or been addicted to heroin or any other drug (Br. at 24). The jury at the first trial quite obviously disbelieved a great deal of what Seijo had to tell them, and there is no reason to conclude that the jury could not also have rejected this statement or at least had a reasonable doubt about it, especially since Seijo's denial of the use of drugs or addiction could quite properly have been viewed by the jury as just another attempt to paint Seijo as an innocent dupe with no connection to narcotics.

C. The fact that possession of heroin is a lesser included offense of possession with intent to distribute did not estop the Government from offering proof of possession.

Seijo, citing cases which hold that the double jeopardy clause forbids a trial of a lesser included offense when the defendant has been acquitted of the greater offense, *e.g.*, *United States* v. *Wexler*, 79 F.2d 526, 528 (2d Cir. 1935), *cert. denied*, 297 U.S. 703 (1936), argues that, since Seijo could not have been retried for the lesser included offense of possession of the heroin, the Government ought to be estopped from proving possession, even if it can not be said with certainty that the jury resolved this factual issue against the Government. Seijo's argument confuses the concepts of Double Jeopardy and collateral estoppel.

It is, of course, well-settled, as a matter of fairness, that a lesser included offense that could have been tried together with a greater offense ought not to be tried after an acquittal on the greater offense. But here neither the defense nor the Government requested a charge on the lesser included offense of possession; see *United States* v. *Harary*, 457 F.2d 471 (2d Cir. 1972); Fed. R. Crim. P. 31(c), and while this barred the Government on Double Jeopardy grounds from *trying* Seijo for possession, it in no way estopped the Government from seeking to prove the fact of possession, insofar as that fact was relevant to the proof of other charges, unless the prior jury verdict conclusively determined that fact against the Government. Seijo's argument to

the contrary is supported by not a single relevant judicial precedent.*

D. Collateral estoppel has no applicability to retrials of multicount indictments.

Even if the only issue which was in dispute at the first trial with respect to Count Five was Seijo's possession of the packet of heroin, Seijo's acquittal on that count should not estop the Government from introducing proof of Seijo's possession of the packet at a retrial of the remaining counts of the multiple count indictment, so long as the trial judge determined, as he plainly did here (Tr. 21), that the evidence was more probative than prejudicial of the charges actually submitted to the jury.

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* The illogical and inequitable reach of Seijo's arguments can be demonstrated by an example. Defendant A is brought to trial for robbing a bank with a dangerous weapon. See 18 U.S.C. § 2113(d). The only issue at trial is whether A used a weapon in connection with the robbery. He is acquitted. Two months after A's acquittal B is arrested for another offense and as a result of his confession to having planned the earlier bank robbery with A and having been the driver of the getaway car in which A escaped the Government becomes aware for the first time of a criminal conspiracy. A and B are then indicted for conspiracy to commit bank robbery.

Under Seijo's analysis, it would be impermissible for the Government in trying A for conspiracy to prove any fact about the conspiracy which was an essential element of bank robbery, since bank robbery is a lesser included offense of bank robbery with a dangerous weapon. See 18 U.S.C. §2113(a) and (d). Thus, for example, it would not be permissible to prove that the bank robbed was federally insured or that any money taken from the bank belonged to or was in the care, custody or control of the bank. See § 2113(a). This would be the case even though it was quite clear that the only issue resolved against the Government in the first trial was that the defendant had not used a dangerous weapon.

Acquittal on one count of a multiple count indictment in no way indicates that the jury has found the Government's evidence on that count unconvincing. The acquittal simply determines that the Government has not proved at least one of the elements of the crime *beyond a reasonable doubt.** With respect to the element of the crime for which the Government's proof is found deficient, the jury may well be satisfied that the defendant is probably guilty, indeed, all that can be said about the Government's proof after an acquittal is that the jury entertained a doubt.

This Circuit's recognition of the limited significance of an acquittal is reflected in two corollary principles. The first is that a jury's acquittal on one count of a multiple count indictment does not preclude it from relying on the proof adduced with respect to that count in assessing the defendant's guilt on the remaining counts of the in-

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* Indeed, a judgment of acquittal may not even reflect this much. Acquittal on some counts of an indictment may be a reflection not that the jury is dissatisfied with the proof, but rather that the jury is exercising its power to show lenity. As this Court pointed out in *United States* v. *Maybury*, 274 F.2d 899, 902 (2d Cir. 1960):

> "The vogue for repetitious multiple count indictments may well produce an increase in seemingly inconsistent jury verdicts, where in fact the jury is using its power to prevent the punishment from getting too far out of line with the crime. See United States v. Collins, 2 Cir., 272 F.2d 650."

Indeed, the jury's decision to be lenient may explain the acquittal on Count Five at the first trial. There is little to discriminate between the quality of the proof presented on Counts One through Four, on which the jury convicted, and on Count Five, on which they acquitted. It is possible that the jury, aware that DiDomenico had not been charged with any crime as a result of the 2.1 grams of heroin seized from him at the time of his arrest, felt that it would be unfair to convict Seijo for having only a slightly larger quantity in his possession when arrested.

dictment. *United States* v. *Zane*, 495 F.2d 683, 692-93 (2d Cir.), *cert. denied*, 419 U.S. 895 (1974). The second principle is that this Court similarly may rely on the proof introduced with respect to a count on which the defendant has been acquitted in determining the sufficiency of the evidence offered with respect to the counts on which the defendant has been convicted. *United States* v. *Finkelstein*, Dkt. No. 75-1154, slip op. 841, 858 (2d Cir., December 1, 1975); *United States* v. *Sisca*, 503 F.2d 1337, 1344 n. 9 (2d Cir.), *cert. denied*, 419 U.S. 1008 (1974).

Accordingly, in the instant case, even if it is assumed that the jurors acquitted Seijo on Count Five because they found that the Government's proof left them with a reasonable doubt about whether Seijo possessed the heroin, the jurors would not have been required, nor indeed expected, to ignore the proof offered with respect to that count in determining whether Seijo was guilty of the conspiracy count. Indeed, when considered together with other proof of Seijo's participation in this entire criminal enterprise, a jury's belief that the defendant had *probably* possessed heroin of a composition similar to that distributed by the other conspirators would certainly contribute significantly to its belief in the defendant's guilt of conspiracy.

Despite the fact that the jury at the first trial was entitled to consider the evidence of possession of the packet in reaching a conclusion concerning Seijo's guilt of the remaining counts, Seijo argues that the jury at the retrial should be precluded from considering this evidence. He thereby impermissibly seeks to convert the equitable doctrine of collateral estoppel "from a shield into a sword." *United States* v. *Maybury*, 274 F.2d 899 (2d Cir. 1960).*

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* In *Maybury* the Government's evidence showed that the defendant forged the endorsements on a Government check and then uttered it. After a bench trial, the trial judge acquitted the defendant of forgery, but convicted him of uttering. This

[Footnote continued on following page]

For as this Court has repeatedly noted, "the *res judicata* doctrine can have no application to separate counts tried under a single indictment." *United States* v. *King*, 373 F.2d 813, 815 (2d Cir.), *cert. denied*, 389 U.S. 881 (1967), citing *United States* v. *Maybury*, *supra*, 274 F.2d 899; *United States* v. *Petti*, 168 F.2d 221, 224 (2d Cir. 1948), *rev'd on other grounds*, 336 U.S. 916 (1949).*

Court reversed because of the inconsistent verdicts of the judge but Judge Friendly indicated that at a retrial the Government could once again introduce evidence of the forgery. Judge Friendly's opinion states:

> "Admittedly, if Maybury had been previously acquitted on a single count indictment for forgery, *res judicata* would prevent the government from attempting to disprove an issue necessarily determined by such an acquittal. United States v. Oppenheimer, 1916, 242 U.S. 85, 37 S.Ct. 68, 61 L.Ed. 161; Sealfon v. United States, supra. But no case has been found where the doctrine has been applied to acquittal on one count of a multiple count indictment when the defendant has successfully appealed conviction on another count of the same indictment. . . . The government's inability to appeal an acquittal on one count in a criminal case should not render this *res judicata* where the defendant has successfully appealed a conviction on another count, at least when the appeal was for inconsistency. Such a result would convert the guarantee of double jeopardy from a shield into a sword."

* See also *United States* v. *Castro-Castro*, 464 F.2d 336 (9th Cir. 1972), *cert. denied*, 410 U.S. 916 (1973). There are several cases which do apply collateral estoppel to retrials of multi-count indictments where the jury acquitted on some counts at the first trial: *United States* v. *Pappas*, 445 F.2d 1194 (3d Cir.), *cert. denied*, 404 U.S. 984 (1971); *Travers* v. *United States*, 335 F.2d 698, 703 (D.C. Cir. 1964); *Cosgrove* v. *United States*, 224 F.2d 146 (9th Cir. 1955); *United States* v. *Flowers*, 255 F. Supp. 485 (E.D.N.C. 1966); *United States* v. *Perrone*, 161 F. Supp. 252 (S.D.N.Y 1958) The applicability of the doctrine in such circumstances has engendered considerable confusion. *Phillips* v. *United States*, 518 F.2d 108 (4th Cir. 1975) (*en banc*), *petition for certiorari pending*, 44 U.S.L.W. 3163 (September 30, 1975). In none of these cases, however, with the exception *United States* v. *Flowers*, *supra*, in which the District Judge reluctantly followed precedent, is there any analysis of the policy considerations which militate against applying collateral estoppel to multi-count indictments.

The view that collateral estoppel ought not to be given effect in retrials of multi-count indictments is a clear recognition that the evidence relating to the count or counts on which the jury acquitted may be highly probative of the crimes charged in other counts, though not rising to proof beyond a reasonable doubt, and that the defendant should not be permitted to keep a second jury from hearing evidence that properly helped persuade the first of his guilt. Collateral estoppel is, after all, a rule of fairness, and retrial in a case such as this one harbors none of the inequities which led to the Supreme Court's decisions in *Ashe* v. *Swenson, supra,* 397 U.S. at 446-47 and *United States* v. *Oppenheimer,* 242 U.S. 85 (1916). See *United States ex rel. DiGiangiemo* v. *Regan,* Dkt. No. 75-2094, slip op. 1281, 1294 (2d Cir., December 29, 1975). The prosecution has not split the charges to permit a practice run or harassed the defendant with multiple trials requiring him repeatedly to answer to the same proof. *United States ex rel. DiGiangiemo* v. *Regan, supra,* at 1294-95. Nor, we submit, after two juries have convicted this defendant on Counts One and Four, can there be any of the fear which lurked in *Ashe* v. *Swenson, supra,* that the defendant might be innocent of the charges. *United States ex rel DiGiangiemo* v. *Regan, supra,* at 1294-95. Moreover, in no meaningful sense can a defendant who stood trial on the same evidence once before and who was convicted be said to "legitimately rely" on the prior partial verdict of acquittal. *Id.* Also, it cannot be said that to reintroduce this evidence at the second trial is a "waste of effort by all concerned." *Id.* In short, none of the policies which have been identified as being served by the doctrine of collateral estoppel, *id.* at 1294-95, are applicable when a multi-count indictment is retried.

In addition, adequate protections exist to prevent any unfairness to the defendant. When proof is offered of a subsequent similar act for which the defendant was acquitted at the first trial, as was for example the case here,

the evidence will only be admissible if it is more probative than prejudicial, Fed. R. Evid. 401-03, and the trial judge is satisfied that the similar act has been proven by a fair preponderance of the evidence. *United States* v. *Leonard*, Dkt. No. 75-1153, slip op. 5843, 5865 (2d Cir., August 28, 1975).*

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* The fact that the acquittal only determined that the Government had failed to prove possession of the packet beyond a reasonable doubt and that, to be admissible as "a subsequent similar act," Seijo's possession of the packet would only have to be proved by a fair preponderance of the evidence, see *United States* v. *Leonard*, Dkt. No. 75-1153, slip op. 5843, 5865 (2d Cir. August 28, 1975), is, of course, not in and of itself sufficient reason to preclude an estoppel. See *United States* v. *Kramer*, 289 F.2d 909, 913 (2d Cir. 19[illegible]). For while an acquittal of tax evasion will not prevent a later civil action by the Government to recover taxes due and owing, since the burden of proof is less in the civil action (*see, e.g., One Lot Emerald Cut Stones*, 409 U.S. 232 (1972); *Helvering* v. *Mitchell*, 303 U.S. 391 (1937), an acquittal of a criminal offense followed by a "quasi-criminal" forfeiture action (requiring only proof by a preponderance) is forbidden by the Double Jeopardy Clause. *E.g., Coffey* v. *United States*, 116 U.S. 436 (1886); *Boyd* v. *United States*, 116 U.S. 616 (1886); *Stone* v. *United States*, 167 U.S. 178 (1897). The basis for distinction between these two seemingly inconsistent lines of cases is that, once the Government has lost a criminal proceeding, it should not be entitled to institute a second, independent proceeding in the hope of imposing criminal or "quasi-criminal" penalties for the same conduct. In other words, one bite at the cherry is enough. But here there has been no second, independent proceeding instituted in which the Government seeks to inflict penalties for the acts of which Seijo was acquitted. Rather, the retrial is part of the same proceedings, necessitated by Seijo's appeal, and the evidence has been introduced not to again inflict a penalty for the acts for which he had been acquitted, but only insofar as that evidence bears on related criminal charges.

POINT II

Seijo's sentencing was in all respects proper.

Seijo raises two claims with respect to his sentencing. First, he argues that Judge Brieant was obliged to state on the record that he found beyond a reasonable doubt that Seijo was the "man behind the scenes" of this narcotics conspiracy before he could rely on testimony to that effect in sentencing him. Second, he contends that the absence of substantive standards for the imposing of criminal sentences violates due process and that this Court should adopt a "least restrictive alternative" criterion when reviewing the term of imprisonment meted out to a defendant.

Seijo's first argument both misstates the facts and misconceives the law. Judge Brieant did not find, as Judge MacMahon had at the first sentencing, that Seijo was the "man behind the scenes" of the conspiracy charged. He did find that there was "no showing of any contrition or anything like that" (Tr. 430-31) and that the information received concerning what had happened since Judge MacMahon sentenced Seijo "does not show any substantial change in circumstances or give me any basis by which I could reasonably reach a different conclusion" (Tr. 431). Further, Judge Brieant indicated his agreement with Judge MacMahon's conclusion "that this particular conspiracy was dealing in large quantities of narcotics, heroin" (Tr. 430) and with Judge MacMahon's comments with respect to "the effect of that type of commerce on the City of New York" (Tr. 430). Judge Brieant emphasized, however, "that the sentence is addressed to my discretion and I must and have looked at the entire issue *de novo*" (Tr. 431).

But even assuming Judge Brieant made the finding which Seijo erroneously imputes to him, there was no

error in the sentencing. The finding, had he made it, would have been supported by Torres' testimony to the effect that Seijo was the man behind the scenes, by the police officers testimony about the delivery of the two eighth kilograms of heroin on June 5, 1974, as well as by the circumstances surrounding Seijo's subsequent arrest.

The argument that Judge Brieant would have been obligated to state on the record that he found *beyond a reasonable doubt* that Seijo was the "man behind the scenes" of the narcotics conspiracy charged before he could consider that factor in sentencing him finds no support in the case on which Seijo exclusively relies, *United States* v. *Hendrix*, 505 F.2d 1233 (2d Cir. 1974). In *Hendrix*, this Court held "that in the future prejury should not be treated as an adverse sentencing factor unless the judge is persuaded beyond a reasonable doubt that he committed it." *Id.* at 1236. *Hendrix* itself makes clear that the special rule regarding a defendant's perjured trial testimony—a rule fashioned to avoid discouraging defendants from testifying because of fear that the jury's or judge's disbelief will automatically lead to an increased sentence—is not to be applied to other sentencing factors. Sentencing judges are still entitled and encouraged to consider all relevant information about the defendant, including crimes not charged in an indictment and indeed "evidence of counts on which a defendant is acquitted." *United States* v. *Hendrix*, *supra*, 505 F.2d at 1235, citing *United States* v. *Sweig*, 454 F.2d 181, 184 (2d Cir. 1972).*

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* Other matters properly considered by the sentencing judge are: Counts of an indictment dismissed by the Government, *United States* v. *Needles*, 472 F.2d 652, 655 (2d Cir. 1973); hearsay evidence, *United States* v. *Rosner*, 485 F.2d 1213 (2d Cir. 1973), *cert. denied*, 417 U.S. 950 (1974); and evidence obtained in violation of the Fourth Amendment, *United States* v. *Schipani*, 435 F.2d 26 (2d Cir. 1970), *cert. denied*, 401 U.S. 983 (1971).

If the district judge is entitled to consider evidence of criminal conduct as to which there has been a determination that the proof thereof did not meet the standard necessary to convict, surely he does not err in considering evidence presented at the trial and found by the jury to have been proved beyond a reasonable doubt. The finding demanded by Seijo is simply not required. The District Court's reliance on trial testimony, if he had relied on it, would have been entirely proper. *United States* v. *Tucker*, 404 U.S. 443, 446 (1972); *United States* v. *Needles*, 472 F.2d 652, 655 (2d Cir. 1973); *United States* v. *Doyle*, 348 F.2d 715, 721 (2d Cir.), *cert. denied*, 382 U.S. 843 (1965).

Seijo's second argument concerning his sentence is, at bottom, a plea for appellate review of sentencing. The Supreme Court, however, has recently endorsed "[t]he general proposition that once it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end." *Dorszynski* v. *United States*, 418 U.S. 424 (1974); see *United States* v. *Velasquez*, 482 F.2d 139, 142 (2d Cir. 1973); *United States* v. *Brown*, 479 F.2d 1170, 1172 (2d Cir. 1973). Alteration of the principle against appellate review of sentences would require Supreme Court action or legislation by Congress.

Two experienced trial judges have heard the evidence, observed Seijo's testimony and reviewed the presentence report. Both have concluded that a fifteen year sentence is appropriate. While Seijo's conviction on Counts One and Four exposed him to a maximum sentence of thirty years, his sentence, of fifteen years, undeniably, was not a slap on the wrist. By no means, however, was it unjust. Seijo was not some pathetic addict convicted of selling a dose of heroin to another addict in order to support his own habit. Rather, the evidence showed him

to be a trafficker in substantial quantities of heroin sold for thousands of dollars. Engaged in an enterprise which plagues our country and motivated by no apparent reason other than greed, Seijo, as the proof showed, provided financing for Hildebrandt's narcotics operation and was ready and willing to use threats and violence to secure his ends. Under the circumstances, there is no basis for disturbing his sentence on this appeal.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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Form 279 - Affidavit of Service by Mail

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

THOMAS M. FORTUIN, being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 19th day of January, 1976 he served a copy of the within brief by placing the same in a properly postpaid franked envelope addressed:

William J. Gallagher, Esq.
Legal Aid Society
509 United States Courthouse
Foley Square
New York, New York 10007

And deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing at One St. Andrew's Plaza, Borough of Manhattan, City of New York.

Thomas M. Fortuin

THOMAS M. FORTUIN

Sworn to before me this

19th day of January, 1976.

Alma Hanson

ALMA HANSON
NOTARY PUBLIC, State of New York
No. 24-6763450 Qualified in Kings Co.
Commission Expires March 30, 1976